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NO. 90-1047

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NATIONAL AMUSEMENTS, INC.,
Petitioner,

v.

CITY OF SPRINGDALE, et al.,
Respondents.

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Respondents have raised a number of new issues that were not initially addressed by Petitioner in its Petition for Writ of Certiorari for the reason that such issues relate to the merits of Petitioner's constitutional claim. The Supreme Court of Ohio never reached the merits of Petitioner's claim in light of its ruling that such claim was barred by the doctrine of *res judicata*. Although these issues will be more fully addressed in the parties' briefs on the merits, Petitioner will briefly respond to such issues in this Reply Brief because they have been raised by Respondents in their Brief in Opposition.

DISCUSSION

A. Federal Question

Respondents assert at the outset of their Brief that this Court lacks jurisdiction to hear this case because the judg-

ment of the Supreme Court of Ohio was supported by an adequate state ground and, therefore, no federal question is presented. Respondents' assertion disregards this Court's earlier pronouncement that the question of whether an asserted nonfederal ground independently and adequately supports a state court judgment is *itself* a federal question to be determined by this Court. *See Douglas* v. *Alabama*, 380 U.S. 415, 422 (1965). This Court has the requisite jurisdiction to issue a writ of certiorari in this case.

B. Ohio Admissions Tax

Respondents argue that, because Ohio had an admissions tax during the period from 1934 to 1947, the Cinema Admission Tax is not discriminatory because it "merely places cinemas back into the Ohio taxing structure so that they are taxed on the same basis as other retail businesses." Brief of Respondents at p. 13. This argument is illusory. The Ohio admissions tax was a tax on all places of amusement or entertainment.[1] It was not, as is the Cinema Admission Tax, a tax solely on a First Amendment-protected activity. Thus, Petitioner is in a vastly different position than the one it would have occupied under the now-repealed Ohio taxing structure. Here, the challenged legislation has expressly singled out Petitioner by taxing only cinemas, notwithstanding Respondents' insistence that Springdale is "not singling out cinemas for dif-

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[1] The Ohio admissions tax was a tax of 3% on the following summarized categories: (1) the amounts received *for admission to any place*, including admission by season ticket or subscription; (2) the excess of amounts received for admission to theatres, operas, and other places of amusement, sold at news stands, hotels, and places other than the ticket offices therefor, over and above the amounts representing the established price therefor at such ticket offices; (3) the amount received for admission to any public performance for profit at any roof garden, cabaret or other similar entertainment where the charge was in the form of a service charge, cover charge, or other similar charge; and (4) the amount received as annual membership dues by every club or organization maintaining a golf course, and on greens fees collected by golf courses.

ferential treatment." Respondents' Brief at p. 13. In *Minneapolis Star and Tribune Co.* v. *Minnesota*, 460 U.S. 575 (1983), this Court rejected a similar argument made by the State of Minnesota that its tax on paper and ink was "part of the general scheme of taxation," stating that the use tax was facially discriminatory in that it singled out publications for treatment. 460 U.S. at 581.

C. *Minneapolis Star*

Respondents erroneously assert the basic question in *Minneapolis Star* to be "whether cinemas are being taxed in the same manner as other retail businesses and at the same or lower rates." Respondents' Brief at p. 12. This assertion was summarily rejected in *Minneapolis Star:*

> We would be hesitant to fashion a rule that automatically allowed the State to single out the press for a different method of taxation as long as the effective burden was no different from that on other taxpayers or the burden on the press was lighter than that on other businesses. One reason for this reluctance is that the very selection of the press for special treatment threatens the press not only with the current *differential* treatment, but with the possibility of subsequent differentially *more burdensome* treatment. Thus, even without actually imposing an extra burden on the press, the government might be able to achieve censorial effects, for "[t]he threat of sanctions may deter [the] exercise [of First Amendment rights] almost as potently as the actual application of sanctions.

460 U.S. at 588 (Emphasis in original).

Minneapolis Star also makes it clear that the constitutional infirmity of the Cinema Admission Tax is not cured by the enactment of Springdale's separate "Entertainment Admis-

sion Tax." The danger with which *Minneapolis Star* is concerned is the power to tax differentially a First Amendment-protected activity. Here, the taxes are enacted in separate, unconnected ordinances. There is nothing to stop Springdale from raising the Cinema Admission Tax and not the Entertainment Admission Tax, or raising one more than the other. Nothing requires Springdale to maintain a uniform tax rate and nothing precludes "the possibility of subsequent differentially *more burdensome* treatment." *Id.* The censorial threat of the differential tax remains.

Minneapolis Star requires that, in attempting to tax a First Amendment-protected activity differentially, the taxing authority must demonstrate a counterbalancing interest of compelling importance that it cannot achieve without differential taxation. *Id.* at 585. Respondents vigorously contend that Springdale presented substantial evidence at trial demonstrating the financial burden imposed upon the City by Petitioner's operations. This evidence was held unpersuasive by the trial court, which specifically found that the City had failed to prove such a compelling governmental interest, finding instead that "the main concern of the council of Springdale in passing the ordinance was to generate general revenue, not to offset the cost of the Showcase Cinema. The trial court also specifically found that ". . . the added costs were not anywhere near the amount generated by the tax . . . ." *See* Appendix to Petition for Writ of Certiorari at p. 48a.

Equally convincing is the preamble of the ordinance which recites its purpose is to raise revenue for general municipal operations of the City. *See* Appendix to Petition for Writ of Certiorari at p. 69a. The absence of sufficient proof of either direct or indirect expenditures by the City allegedly necessitated by the Showcase Cinemas to support a claim of compelling governmental interest was specifically addressed

in Petitioner's Post-Trial Brief, with which the trial court subsequently agreed in its written opinion.[2]

Neither the court of appeals nor the Supreme Court of Ohio challenged, found against the manifest weight of the evidence, or even addressed this factual finding, and Petitioner submits that it is not within the appellate ambit to argue such a factual challenge at this juncture in the proceedings.

In *Minneapolis Star*, the State's proffered rationale for the imposition of the differential tax was, as here, the desire to raise revenue generally. This Court held that an interest in raising revenue, notwithstanding that such interest is critical, is itself insufficient to demonstrate a compelling governmental interest. 460 U.S. at 586.

D. Substantive v. Procedural Grounds

Quoting from *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394 (1981), Respondents attempt to avoid the cases cited by Petitioner on the basis that they involved state procedural, and not state substantive, grounds. In the quoted language, however, this Court was reiterating the public policy underlying *res judicata*. The Court did not hold that *res judicata* is, for all purposes, a substantive matter. Further, this Court has stressed that a prior judgment's preclusive application must give way in the tax context:

> Such consequences, however, are neither necessitated nor justified by the principle of collateral estoppel. That principle is designed to prevent repetitious lawsuits over matters which have once been decided

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[2] *See* Supplemental Appendix, including Petitioner's Post-Trial brief and referenced, supporting record citations.

> and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers.

Commissioner of Internal Revenue v. *Sunnen*, 333 U.S. 591, 599 (1948).

The distinction between state substantive and state procedural grounds made by this Court in *Henry* v. *Mississippi*, 379 U.S. 443 (1965), also quoted by Respondents, is here neither dispositive nor relevant. In *Henry*, this Court pointed out that where a state court judgment involves a state substantive ground and also decides a federal question, this Court's view of the federal ground does not affect the outcome *if* the state substantive ground is allowed to stand. Of course, the question of whether the state ground *will* be allowed to stand depends on the separate determination by this Court of whether it rests upon a fair or substantial basis. *See Broad River Power Co.* v. *State of South Carolina*, 281 U.S. 537 (1930). In the present case, no federal question was decided. The court below rested its decision solely on the ground of *res judicata*. Respondents' citation of *Henry* does not decide the issue of whether the state ground asserted in this case is, in fact, an adequate state ground.

E. The Decision Below

Respondents assert that Petitioner's Brief "did not seriously challenge" the City's contention that the decision of the Supreme Court of Ohio is "entirely consistent" with its prior decisions. To the contrary, Petitioner specifically pointed out in its Brief that the court below (1) wholly ignored its decision in *Hooven & Allison Co.* v. *Lindley*, 4 Ohio St. 3d 169, 447 N.E.2d 1295 (1983), *vacated*, *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353 (1984) and failed to consider whether *Minneapolis Star* constitutes a significant change in the con-

trolling constitutional law; (2) ignored its prior holdings that *res judicata* will not act as a bar where there has been a change in the facts that raises a new material issue; and (3) misapplied *res judicata* to different tax periods without discussion and contrary to settled Ohio precedent.

Respondents' assertion that in rendering its decision the Supreme Court of Ohio "relied entirely on Ohio law" is also wholly inaccurate. The cases cited in the syllabus by the Supreme Court of Ohio are all cases in which no federal constitutional issue was involved, and the body of the decision failed to consider *res judicata* or collateral estoppel in the context of a federal constitutional issue. The court stated the general rule as set forth in the syllabus applies to changes in constitutional law, citing for support only a case from New York State.

F. *Limbach*

In *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353 (1984), this Court reversed the decision of the Supreme Court of Ohio because that court had failed to apply the principles of *Commissioner of Internal Revenue* v. *Sunnen*, 333 U.S. 591 (1984). *Sunnen* held that collateral estoppel cannot be applied to bar claims based on different tax years in the face of intervening decisions of this Court. Respondents contend that the principles of *Limbach* and *Sunnen* do not apply here because those cases involved annual taxes. This is a distinction without a difference. *Limbach* and *Sunnen* involved continuing taxes which were remitted annually. The Cinema Admission Tax is similarly a continuing tax which is remitted quarterly. The underlying rationale of the rule set forth in *Sunnen* is to avoid an undue disparity in the impact of income tax liability. In that case, this Court reasoned:

> A change or development in the controlling legal principles may make [a prior] determination [of a tax matter] obsolete or erroneous, at least for future purposes.

> If such a determination is then perpetuated each succeeding year as to the taxpayer involved in the litigation, he is accorded a tax treatment different from that given to other taxpayers of the same class. As a result, there are inequalities in the administration of the revenue laws, discriminatory distinctions in tax liability, and a fertile basis for litigious confusion. (citation omitted). Such consequences, however, are neither necessitated nor justified by the principle of collateral estoppel.

333 U.S. at 599.

Respondents' statement that "the prior judgment determined the constitutionality of tax for all future years" is the very antithesis of *Sunnen*. In the tax context, a new tax liability occurs each time a tax is paid, regardless of whether it is paid annually, quarterly, or on a weekly basis. The fact that a new tax liability occurs on a more frequent basis than annually is irrelevant where, as here, the taxpayer is treated differently from other taxpayers; the anomaly specifically rejected by *Sunnen*.

Respondents also erroneously state that in *Limbach*, this Court held that collateral estoppel would not apply because *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652 (1945) [Hooven I] was based upon an overruled decision. Respondents then argue, because the decision in Petitioner's earlier case was not based upon any subsequently overruled decision, *res judicata* remains a bar to this action. To the contrary, in *Limbach*, this Court reversed the decision of the Supreme Court of Ohio specifically because that court had erroneously required the earlier decision to have been expressly overruled in order to avoid the *res judicata* defense. This Court stated that while *Hooven I* was not expressly overruled by the later case (*Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976)) the foundation of *Hooven I* had been "seriously undermined" by *Michelin*. 466 U.S. at 359. Continuing, this Court observed

that *Michelin* had adopted a "fundamentally different approach" and had "changed the focus" of Import — Export Clause cases. *Id.* at 359-60. That *Minneapolis Star* did not overrule any earlier decision is irrelevant. Its holding mandates a bar to the application of *res judicata* in the present case.

Respondents also suggest that *Minneapolis Star* does not prevent application of *res judicata* in the present case because it "did not blaze any new trails." Respondents erroneously seem to construe *Minneapolis Star* merely as a reiteration of the holding in *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936). The *Minneapolis Star* decision emphasized that while there were similarities between the two cases *Grosjean* was not controlling. The result reached in *Grosjean* was attributable to the perception that the state had imposed the tax with the intent to single out a selected group of newspapers that had "ganged up" on Senator Huey Long. 460 U.S. at 580. In *Minneapolis Star*, this Court had before it no legislative history, no indication, apart from the structure of the tax itself, of any impermissible or censorial motive on the part of the legislature. The differential tax was analyzed anew under the general protection of the First Amendment. *Id. Minneapolis Star*, unlike *Grosjean*, further recognizes and declares improper censorial motive or illicit legislative intent unnecessary as a predicate to First Amendment protection against differential taxation.

CONCLUSION

The ground-breaking decision of *Minneapolis Star* articulated for the first time a new constitutional standard to be applied in the analysis of taxing schemes that discriminate against First Amendment-protected activities. Under this newly-pronounced standard, a tax that differentially burdens rights protected by the First Amendment cannot stand unless that burden is necessary to achieve an overriding governmental interest. *Id.* at 582. Under *Minneapolis Star*, the Springdale Cinema Admission Tax is plainly unconstitutional and cannot be permitted to stand. The Supreme Court of Ohio, by relying on the state doctrine of *res judicata*, purported to foreclose forever judicial review of the constitutionality of the ordinance. Its decision does not rest on an adequate state ground and, therefore, does not bar review by this Court.

Respectfully submitted,

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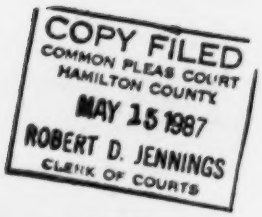

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

NATIONAL AMUSEMENTS, INC.	:	
	:	Case No. A-840563
Plaintiff	:	(Crush, J.)
	:	
v.	:	PLAINTIFF'S POST-TRIAL BRIEF
CITY OF SPRINGDALE, et al.	:	
	:	
Defendants	:	

INTRODUCTION

National Amusements, Inc. ("National"), the plaintiff, has challenged the constitutionality of an ordinance enacted by the City of Springdale ("City"), the defendant, which levies a tax directly and exclusively on admissions charged at cinemas. The effect of the ordinance, plaintiff contends, is to tax differentially and impermissibly an activity which is constitutionally protected under the First Amendment to the Constitution of the United States and Section 2 of Article 1 of the Constitution of the State of Ohio.

The necessary predicate for plaintiff's challenge of the ordinance is the presence of a constitutionally protected activity. Quite understandably, the City does not deny that National's presentation of motion pictures is a constitutionally protected First Amendment activity. The commercial presentation of motion pictures is well-established as a protected activity under the First Amendment and applicable to the States under the Fourteenth Amendment to the Constitution. Plaintiff's Trial Brief, p. 4 citing Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495

(1952); R.K.O. Radio Pictures, Inc. v. Dept. of Education, 71 Ohio L. Abs. 246 (Franklin Cty. 1955). The challenged ordinance impresses this protected activity by taxing directly the exhibition of motion pictures to the public. The ordinance's potential for abusive economic use and censorial threat are alone sufficient to constitute actionable interference with First Amendment rights and those similar rights under the Ohio Constitution.

This matter is one of first impression in Ohio, so far as we have been able to determine but it is not one of first impression in the United States. The controlling law has been pronounced recently by the Supreme Court in Minneapolis Star v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983) ("Minneapolis Star") which refines the two necessary relevant issues to be determined in the matter sub judice:

> Under what circumstances, if any, may the City constitutionally enact an ordinance which imposes a differential tax solely and exclusively on admissions to cinemas; and,
>
> Has the City met its heavy burden of proving a compelling governmental interest sufficient to justify such a differential tax?

DISCUSSION

I. To Tax A First Amendment Protected Activity Constitutionally, the City Must Prove A Compelling Governmental Interest That It Cannot Achieve Without Differential Taxation.

The United States Supreme Court has made it clear, "a tax that burdens rights protected by the First Amendment cannot

stand unless the burden is necessary to achieve an overriding, compelling governmental interest." Minneapolis Star, 460 U.S. at 582. The appropriate method of analysis is to balance the burden implicit in singling out the protected First Amendment activity against the interest asserted by the City. Minneapolis Star, 460 U.S. at 585. Under Minneapolis Star, the taxing ordinance cannot survive unless there is asserted a compelling governmental interest which outweighs the burden and which cannot be achieved by means that do not infringe First Amendment rights as significantly. Legislative reasonableness is not the constitutionally permissible test. Id. fn. 7.

The City has erroneously sought to rely upon several Ohio cases upholding revenue taxes generally, in its search for a constitutional underpinning of the challenged ordinance. Defendant's Trial Brief, p. 10. But none of the cases cited by the City (admission to bowling alleys and golf driving ranges) involve differential taxation of a protected First Amendment activity. The well-recognized standard of judicial review applied to tax legislation not involving a protected First Amendment right is one of legislative reasonableneses buttressed by a "rational relationship" to on-going municipal revenue raising. City of Richmond Heights v. LaConti, 19 Ohio App. 2d 100, 113 (Cuyahoga Cty., 1969) That general standard has no application in this case and is not sufficient to enable the challenged ordinance to pass constitutional muster.

The defendant has also devoted considerable effort to

establish an undisputed irrelevant point; that the ordinance enacting the tax is content-neutral. Transcript of Proceedings ("T.P.") pp. 186, 270, 345. The City seeks to avoid any meaningful restrictions on its power to impose the differential admission tax on cinemas by contending that unless the tax imposed is expressly content-related, the First Amendment only requires that the legislation be reasonably related to a legitimate legislative objective. T.P. at 18 citing City of Renton v. Play-Time Theaters, ____ U.S. ____, 89 L. Ed. 2d 29, 106 S.Ct. 925 (1986) (wherein the City of Renton enacted an ordinance prohibiting adult motion picture theatres from being located within certain residential zones).

The City's reliance on this case is misplaced. Justice Rehnquist, writing for the majority of the Renton court, observed that the ordinance, in restricting the location of adult theatres showing sexually explicit films, "did not appear to fit neatly into either the 'content-based' or 'content-neutral' category." 89 L.Ed. 2d 39. The majority opinion permitted the City of Renton to rely heavily on studies conducted in Seattle and permitted the findings in Northend Cinema, Inc. v. Seattle, 585 P.2d 1153 (1978) to be accepted in Renton, noting:

> [T]he (trial) court heard extensive testimony regarding the history and purpose of these ordinances. It heard expert testimony on the adverse effects of the presence of adult motion picture theatres on neighborhood children and community improvement efforts. The court's detailed findings, which include a finding that the location of adult theatres has a harmful effect on the area and contributes to neighborhood blight, are supported by substantial

evidence in the record.

> The record is replete with testimony regarding the effects of adult movie theatre locations on residential neighborhoods. (citing Northend) Id. at 40.
>
> [W]e find that the Renton ordinance represents a valid governmental response to the 'admittedly serious problems' created by adult threatres. Renton...has sought to make some areas available for adult theatres...while...preserving the quality of life in the community at large by preventing those theatres from locating in other areas. This, after all, is the essence of zoning. Id. at 42.

The serious harmful effects posed by adult theatres were found to be a governmental interest of compelling importance established and supported by a record replete with expert testimony. The zoning ordinance was found to serve a substantial governmental interest and allow for reasonable alternative avenues of communication because it left "some 520 acres...of ample, accessible real estate" open to use as adult theatre sites. Id. at 41.

The Supreme Court of the United States has repeatedly invalidated legislation restricting First Amendment rights even though such legislation is content-neutral. Specifically to the point here is the holding in Minneapolis, supra. The differential taxation imposed upon the press was most assuredly content-neutral. It taxed only ink and paper, but it failed constitutionally. See also Anderson v. Celebrezze, 460 U.S.780 (1983) (where the Court struck down an early filing deadline as infringing upon First Amendment associational rights); Buckley v. Valeo, 424 U.S. 1 (1976) (where the Court invalidated expenditure

limitations on behalf of candidates because such limitations affected First Amendment rights.) The Supreme Court has declined to reduce or limit the First Amendment guarantees to a prohibition only of content-related taxes, as the City urges.

II. The City Failed To Assert and to Prove A Counter-balancing Governmental Interest Of Compelling Importance

A. A Desire To Raise Revenues Does Not Constitute A Compelling Governmental Interest Under the Holding in Minneapolis Star.

The City candidly admits the rationale for its enactment of the Cinema Admission Tax was its desire to raise revenue for the general municipal operations of the City. Mr. Doyle Webster, City Treasurer testified:

> Q. [I]t is also true, is it not, sir, that the rationale for adopting the admission tax that the Council did adopt in 1978, was to increase revenue to the City?
>
> A. That's true.

T.P. p. 207.

> Q. The underlying reason was to increase revenue to the City, isn't that correct?
>
> A. That's true.
>
> Q. [T]he real purpose ... was to generate additional revenues for the purposes described in the ... ordinance ... is that true?
>
> A. That's true.
>
> Q. Exhibit No. 1 ... the second page, paragraph 97.02, it there states, does it not, sir, what the purpose is ...?

A. It does.

T.P. p. 208.

Indeed, City Council in enacting the ordinance declared its purpose to be:

> For the purpose of providing revenue for the purposes of general municipal operations, maintenance, new equipment, extension and enlargement of municipal services and facilities and capital improvements by the city, there is hereby levied a tax of 3 percent on the amounts received for admission to any cinema in the City of Springdale.

Joint Exhibit 1, T.P. p. 209.

The City Treasurer also testified that no one specific purpose stated in the ordinance outweighed any other.

> Q. [O]f those purposes which you just read, general municipal operations, maintenance, new equipment, extension and enlargement of municipality services and facilites and capital improvements by the city, taking those as a group, Mr. Webster, it is true, is it not, that no one of those reasons had such predominant importance as to outweigh any of the other reasons given?
>
> A. I think that's a true statement.

T.P. p. 209. See also T.P. pp. 233, ll.16 - 235, l.1.

The City Treasurer further testifed that the taxes collected by the City as a result of the ordinance have all been placed in a General Revenue Fund and have not been earmarked for any special purpose or improvement relating to the cinemas. T.P. p. 209. The money collected by the City is used for all general purposes including payments of painting buildings, street widening, and a host of permissible uses under the general fund. T.P. p. 210.

The City has not had to hire additional personnel because of National's presence, nor did the City enact the ordinance to widen the off-ramp from Interstate 275 at State Route 4 adjacent to the theatre.

> Q. It is also true, is it not, Mr. Webster, that no extra police, fire or life squad personnel have been hired because of Showcase Cinema?
>
> A. To my knowledge, they have not been.
>
> * * *
>
> Q. ...It is also true, is it not, sir, that the city did not enact a tax in order to widen the ramp coming off of I-275 onto State Route 4?
>
> A. I would say that is true.

T.P. p. 215, ll. 8-19.

Mr. Cecil Osborne, City Administrator confirmed and agreed with Mr. Webster's recollection and account of the City Council's discussions concerning the Cinema Admission Tax. He further testified that at the time of the enactment of the ordinance, the City was in the midst of a very dramatic expansion in the commercial districts. The City was looking at ways to raise revenue to offset planned improvements and expenditures. T.P. p. 318. Such testimony confirms that the City was seeking ways to increase its general revenue for general improvements.

The City, now wishes to disavow the clear language of the ordinance, the testimony of its witnesses and the actual use of the cinema tax proceeds, with the afterthought that the Cinema Admission Tax was enacted to provide (vaguely identified) special

services and road improvements which are offered as necessary to accommodate National. T.P. p. 225. Defendants' Exhibit 9 (identical to Plaintiff's Exhibit 5), lists four alleged improvements which it claims were made exclusively for the benefit of National. However, the City has offered no evidence contemporaneous with the enactment of the ordinance, which would support the notion that any of these items were ever discussed as being necessary to accommodate National solely and exclusively. In fact the City Treasurer admitted that the cinema tax was not enacted specifically to make road improvements for National. T.P. p. 215. Moreover, the City Treasurer and the City Administrator both admitted that no additional policemen, firemen or life squad personnel have been hired because of National. T.P. pp. 207, 215, 394. The City did not even contemplate that there would be any services necessary to provide to cinemas that were not otherwise provided to all other businesses. T.P. p. 252.

If indeed the City had such a specific and compelling mandated governmental interest improvements in order to accommodate National, it would appear that the amounts of money collected by the City from the Cinema Admission Tax should be at least somewhat proportionate to the monetary need of the City for the improvements. Such is not the case. The alleged improvements made by the City for the supposed benefit of National are: 1) a loop detection system installed in 1980 at a cost of $2,350; 2) a right hand turn lane added in 1982 at a cost

of $41,589; 3) a median barrier constructed in 1982 at a cost of $4,000; and 4) an overhead sign which was not even put up at the time of trial at a projected cost of $11,020. T.P. p. 132. Defendants' Exhibit 9. The total cost to the City of the three presently constructed incidental improvements was $47,945. On the other hand, the amount of admission taxes collected by the City to cover these "improvements" from January 1, 1979 to September 30, 1984 was $535,139.14, a surplus for the City's general municipal operations and general capital improvements of almost one half million dollars. T.P. p. 29.

B. The City Did Not Use The Least Restrictive Means To Meet Its General Revenue Needs.

Under the holding in Minneapolis Star, not only must the compelling governmental interest outweigh the burden on First Amendment rights, but the City must show that it cannot achieve its end by any other less restrictive means. Minneapolis Star, 460 U.S. at 585. The City admittedly did not consider any alternative ways of raising funds for any perceived future need brought about because of National. The City Treasurer conceded that no reports were generated or data compiled or any studies made which indicate any special need of National. T.P. p. 253. The City Administrator testified:

> Q. You were not asked and you did not make any representations or provide any data to the City Council before it enacted this ordinance, did you?
>
> A. No, Sir, I did not.

T.P. p. 394.

Mr. Harold Rink, Tax Commissioner for the City,

testified that while the City's Transient Occupancy Tax was enacted in anticipation of future services that might be required by the hotels, he was never given any information about any anticipated services that might be required by the cinemas before the enactment of the Cinema Admissions Tax. T.P. pp. 292-293. The City Treasurer testified in deposition that National could have been assessed but later testified "We have no road assessments in the City of Springdale." T.P. p. 216.

The foregoing testimony confirms that the City did not seek the least restrictive means of raising revenues either by taxing businesses generally or through an assessment process. Instead, it chose to single out and burden a First Amendment activity.

C. Differential Taxation Of A Protected First Amendment Activity Places An Even Heavier Burden On The City.

The City's tax on the admission price to cinemas is exacerbated by the fact that for a period of almost five years after the enactment of the Cinema Admission Tax, no other place of entertainment which also charged admission was burdened with an admission tax. Daniel Comer, owner of The Boulevard, a nightclub located in Springdale, testified that although he has charged admission to see entertainment at his nightclub since 1972, the City did not levy any tax on admission to other forms of entertainment until 1984. T.P. pp. 57-61.

Thus, although entertainment admission charges were being made elsewhere within the City at the time of the enactment of the Cinema Admission Tax, the City singled out cinemas because

the cinemas were more cost effective to tax. T.P. pp. 206,207. As a result, cinemas alone bore the entire impact of the tax. The Supreme Court in Minneapolis Star held that a tax which singles out a protected First Amendment activity for special treatment places an even heavier burden of justification on the [City] stating "differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." Minneapolis Star, 460 U.S. at 583-585.

D. The City's Enactment Of A Subsequent Tax On Other Places Of Entertainment Has Not Cured The Unconstitutionality Of the Cinema Admission Tax.

In 1984, the City enacted an "Entertainment Admission Tax" which taxes admission to any place of entertainment except cinemas. Joint Exhibit 2. Despite the enactment of this subsequent tax, the constitutional flaw inherent in the Cinema Admission Tax still exists: the power to censor. By taxing the cinemas through a separate ordinance, the City retains the threat and the power to increase arbitrarily the Cinema Admission Tax. This present potential was directly discredited by the Minneapolis court:

> The main interest asserted by Minnesota in this case is the raising of revenue. Of course that interest is critical to any government. Standing along, however, it cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses generally, avoiding the censorial threat implicit in a tax that singles out the press. 460 U.S. 586.

CONCLUSION

The City failed to meet its heavy burden of proving a counter-balancing interest of compelling importance - that it cannot achieve without differential taxation of a protected First Amendment activity. The City may not constitutionally single out cinemas and differentialy tax them in its desire to raise revenue for general municipal purposes. National respectfully prays:

1. Ordinance No. 67-1978 be declared unconstitutional from its inception to September 30, 1984;
2. Plaintiff be awarded the amount of tax paid by Naticnal from January 1, 1979 to September 30, 1984 in the amount of $535,139.14 with the cost of interest which it has paid for said sum through March 31, 1986 of $258,695; and
3. For its costs, and such other and further relief as this Court deems proper.

Respectfully submitted,

STRAUSS & TROY

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foreoing Post Trial Brief of Plaintiff was served by hand deliverey, on Harold Korbee, Esq., Wood & Lamping, 800 Tri-State Building, Cincinnati, OHio on the 15th day of May, 1987.

STRAUSS & TROY

Charles G. Atkins

not be cost effective, isn't that true?

A. That's true.

Q. And it's also determined that because they were already -- The Boulevard was already paying a thousand cabaret tax, that they could let it go for that reason, isn't that true?

A. Yes, sir.

Q. All right. Now, it was also true because The Boulevard charged admission only on an irregular basis and it would be, again, too hard to police and not cost effective, isn't that true?

A. That is true.

Q And for those reasons, therefore, council ultimately decided not to enact a tax which included The Boulevard, isn't that true?

A. That is true.

Q. Very well. Now, it is also true, is it not, sir, that the rationale for adopting the admission tax that the council did adopt in 1978, was to increase revenues to the city?

A. That's true.

THE COURT: Wait a minute. Did you say that was the main reason or what -- did you say one of the rationale?

MR. ATKINS: That was the rationale.

that what you mean?

MR. ATKINS: Let me withdraw this line of questioning.

THE COURT: Thank you.

MR. KORBEE: I won't object to that.

MR. ATKINS: Now everybody is happy.

BY MR. ATKINS:

Q. It is also true, is it not, Mr. Webster, that no extra police, fire or life squad personnel have been hired because of Showcase Cinema?

A. To my knowledge, they have not been.

Q. Do you have knowledge of what is meant by a bank run in connection with police details or police services?

A. No, I don't.

Q. You don't. It is also true, is it not, sir, that the city did not enact a tax in order to widen the ramp coming off of I-275 onto State Route 42

A. I would say that is true.

Q. It is also true, is it not, sir, that in connection with the improvement that was ultimately made in front of the theater, the right-hand lane improvement -- do you recall that?

A. Yes.

Q. In other words, it's really an

were apparently a number of things discussed about the cinema tax before it was enacted, is that correct?

A. That's correct.

Q. Some of those things had to do with capital improvements, some had to do with additional income to the city, some had to do with feasibility or could we collect the tax cost effectively, is that correct?

A. That's correct.

Q. Was traffic in any sense an overriding consideration in any of these discussions?

A. Here again I cannot in good conscious answer that. It was a factor that was brought up. We talked about the tax, but I don't know whether it was overriding or not. I really didn't keep a timer on how many hours we spent talking about each subject.

Q. It is true, is it not, that you were never involved in any discussions and nobody ever asked you for an opinion expressing, in effect, we got to tax the cinemas because there's a big traffic problem created by them? That never -- that never took place, did it, sir?

A. Did anyone ever ask me that question or make that statement to me? The answer is no.

Q. All right. When we're talking about

potential, and that is a problem that the city knew was going to have to be addressed.

Q. What else? We're talking about services I thought. I thought that Mr. Weckman using the word service is not capital improvements.

A. Well, you would have to ask Mr. Weckman what he had in mind there.

THE COURT: Pardon me, before the thought escapes me, do you have a fire department?

WITNESS: Yes, we have a fire department, have our own life squad, and that is certainly a service that's provided, but Mr. Atkins wanted ones that were provided for just the cinema, general services.

BY MR. ATKINS:

Q. Were there any services the city was contemplating to be necessary to provide the cinema owners that weren't otherwise provided to all other businesses?

A. No, I'm not aware of any services --

Q. The point being -- I'm sorry, I didn't mean to interrupt you.

A. Specifically for them.

Q. All right. I guess the point being

since 1980.

Q. That's still a fairly good number?

A. Yes, sir.

Q. Do you know what that number would have been prior to 1980?

A. I believe the 1970 census had it at 5,000, just over 5,000.

Q. Now I want to talk next about what was happening in Springdale in late 1978, some of the things that you have observed, some of the things that the city was concerned with in connection with the growth of the city. Taking you back to approximately October, November of 1978, what were the considerations that the city had with respect to revenues and expenditures?

A. We were in the midst of a very dramatic growth period for the community. Attempting to predict the need for improved structure and improved services, we were looking at revenues to offset those planned improvements and expenditures.

THE COURT: What do you mean you were in a growth period? What was growing?

WITNESS: The commercial districts of the city, sir. Your Honor, the community is fairly equally divided in terms of industrial,

five minutes.

So while I cannot tell you that it certainly is not an exclusive improvement related to Showcase, it's an improvement that the city has undertaken in order to better serve the community. Showcase is deriving the benefit of that improvement.

Q. As is every other business in the community?

A. Most definitely.

Q. My question was then no fire, police or life squad personnel have been added exclusively of Showcase Cinema, isn't that true?

A. Yes, sir. We haven't added it exclusively for any business in the city.

Q. Very well. You were not asked and you did not make any representations or provide any data to the city council before it enacted this ordinance, did you?

A. No, sir, I did not.

MR. NEMAN: Your Honor, I'll object.

THE COURT: Wait, wait. Read the question. What was it?

(The preceding question was read aloud by the court reporter.)